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JUL 27 1946

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 338

MAX KUT,

Appellant,

vs.

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF OHIO

No. 30456

MAX KUT,

Plaintiff-Appellant,

vs.

ALBERS SUPER MARKETS, INC., B. MANISCHEWITZ CO., BLUE BIRD PIE CO., GEORGE WIEDEMANN BREWING CO., INC., *Defendants,*

and

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, AND BOARD OF REVIEW THEREOF, *Defendants-Appellees.*

STATEMENT MAKING AGAINST THE JURISDICTION OF THE UNITED STATES AND MOTION TO DISMISS OR AFFIRM

Statement Against Jurisdiction

The Bureau of Unemployment Compensation of the State of Ohio and the Board of Review thereof respectfully submit that the Supreme Court of the United States does not have jurisdiction of this attempted appeal for the following reasons, to-wit:

I

The Record Herein Does not show that the Federal Question was Reserved by the Appellant in the State Courts

The burden is upon appellant to make an affirmative showing by the record that the federal question was properly raised. This appellant has failed to do.

Chicago, Ind. & L. Ry. Co. v. *McGuire*, 196 U. S. 128.

II

The Decision of the Supreme Court of Ohio rests upon a State Ground which Independently and Adequately supports the Judgment

The Supreme Court of Ohio, in addition to and independent of any federal question, placed its decision and judgment upon a state ground which adequately supports its judgment.

The record, which is on file in the Supreme Court, shows that the appellant refused to return and accept his former job with this employer, a job for which he was reasonably fitted and which did not require him to work on his Sabbath. That, under the unemployment compensation law of Ohio, this disqualified him to receive benefits and in no way involved any constitutional or federal question.

Bell Telephone Co. of Pa. v. *VanDyke*, 296 U. S. 533,
Fox Film Corp. v. *Mueller*, 296 U. S. 207,
Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157,
Richardson Machine Co. v. *Scott*, 276 U. S. 128,
Lynch v. *New York*, 293 U. S. 52,
Wade Holley v. *R. H. Lawrence, Warden*, 317 U.S. 518.

III

The United States Supreme Court is bound by Ohio Supreme Court on Interpretation of State Statutes aside from any Federal Question

Senn v. *Tile Layers Prot. Union*, 301 U. S. 468,
Campbell v. *Olney*, 262 U. S. 352,
Douglas v. *New York, N. H. and H. R. Co.*, 279 U. S. 377.

IV

No Substantial Federal Question Involved

The Ohio unemployment compensation law does not, in any way, abridge the privileges or immunities of the ap-

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pellant; nor deprive him of life, liberty or property without due process of law; nor deny him the equal protection of the law. There is no discrimination, it applies to all alike.

The Supreme Court of Ohio held that the statute did not violate the constitution of Ohio. The Supreme Court of the United States is bound by that interpretation.

Senn v. *Tile Layers Prot. Union*, 301 U. S. 468,
Lynch v. *New York*, 293 U. S. 52.

This case arose when appellant filed a claim for benefits with the Bureau of Unemployment Compensation. The Administrator denied the benefits and appellant appealed to the Board of Review of the Bureau of Unemployment Compensation. A trial of this matter, at which testimony was introduced, was had before the said Board of Review. This is in accordance with Section 1346-4, General Code of Ohio. The Board of Review, upon the conclusion of the trial and the introduction of all of the evidence, rendered its finding and decision. In this finding it found as follows:

> "Claimant was employed by the Albers Super Markets, Inc., June 21, 1943, as an order clerk. He continued in this capacity until about November 15, 1943, at which time he was assigned to duties as a checker. Early in March, 1944, the Union objected to claimant being promoted in advance of other employees who had acquired more seniority. Employer was therefore required to relieve claimant of his duties as a checker and offered to transfer him to his former work as an order clerk, but claimant refused to return to this work. His employment terminated March 7, 1944."

The appellant then took an appeal under the provisions of the aforementioned section to the Common Pleas Court of Hamilton County. This is not an appeal on which the matter is tried *de novo*. It is in the nature of an error proceeding and it is heard and argued upon the record which

is made before the Board of Review, a transcript of which it is required to file with the Common Pleas Court. This Section 1346-4 of the General Code of Ohio, among other things, provides:

> "The board (,) upon written demand filed by an appellant, shall within thirty days after the filing of such demand, file with the clerk of such court a certified transcript of the record of the proceedings pertaining to the decision complained of, and the evidence considered by the board or the referee, or both, in making such decision and the appeal shall be heard upon such transcript and the evidence certified by the board of review. Such transcript and evidence upon being filed with the clerk of the courts shall become and be a part of the record in the case, without being included in a bill of exceptions. After an appeal has been filed in the common pleas court, the administrator or the board of review may, by petition, be made a party to such appeal. If the common pleas court shall find that the decision was unlawful, unreasonable, or against the manifest weight of the evidence it shall reverse and vacate the same or it may modify the same and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision. Any party shall have the right to appeal from the court of common pleas as in ordinary civil cases."

Our courts have held that this appeal is an error proceeding and not a trial *de novo* and that no evidence can be introduced thereon.

> *Brown-Brockmeyer* v. *Board of Review*, 70 O. A. 370, *Hauswirth* v. *Board of Review*, 69 O. A. 79.

The record in this case was made at the trial or hearing held by the Board of Review. This record was certified to the Common Pleas Court of Hamilton County, pursuant to the above statute, and became a part of the record without further proceedings. This record was then later certified by the Common Pleas Court to the Court of Appeals for

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Hamilton County and later was certified by it to the Supreme Court of Ohio and was the original record before the Supreme Court of Ohio on which it heard and decided this case. Appellant just had a short abstract of the record made, leaving out all of the record except the transcript of the docket and journal entries in the Common Pleas Court, assignment of error and the transcript of the docket and journal entries in the Court of Appeals. Nevertheless, the original record, which contains the evidence produced at the trial or hearing of this case before the Board of Review was before the Supreme Court and is the only record in this case.

The Supreme Court rightfully looks to and relies on this original record. The giving of permission to the appellant to just print a meagre abstract of the record did not take the place of the original record nor did it prevent the court from examing the original record or basing its decisions upon the facts and testimony found in said original record.

The Supreme Court of Ohio, in rendering its decision and judgment, definitely and clearly rested its decision upon a non-federal ground, in interpreting the Ohio unemployment compensation law which was independent of any federal question and which said non-federal ground adequately supports its judgment. Section 1345-6 of the General Code of Ohio provides, among other things:

> "a. No individual shall be entitled to any benefits unless he or she
>
> "(4) is able to work and available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted; and
>
> "(5) is unable to obtain work in his usual trade or occupation or any other employment for which he is reasonably fitted including employments not subject to this act.
>
> "d. Notwithstanding the provisions of subsection (a) of this section, no individual may serve a waiting

period or be paid benefits for the duration of any period of unemployment with respect to which the administrator finds that such individual:

"(2) has refused to accept an offer of work for which he is reasonably fitted, or has refused to accept a referral to a job opportunity when directed to do so by a local employment office of this state or another state;"

In the evidence which was taken at the hearing before the Board of Review and which is in the transcript of the record which it certified to the courts, and which was before the Supreme Court of Ohio, it appears by uncontradicted evidence of the employer that after it was required to remove Kut from the job as checker, it offered to return him to his former job as order clerk in which he had worked for a number of months and on which he did not have to work on his Sabbath, and that he refused to take his old job. And in the testimony of Mr. Kut, taken at the hearing, he testified that he would not have accepted it. On these facts, which are clearly shown in the record and which beyond question of doubt was before the Supreme Court, and which it had a right to rely upon, the Supreme Court held that appellant was unavailable for the reason that he refused his original position as order clerk and thus made himself unavailable for work. He thus violated Section 1345-6-a-(5) and (d)-(2) of the General Code of Ohio in that he was not unable to obtain work in his usual trade or occupation and that he also failed and refused to accept an offer of work for which he was reasonably fitted. This provision, under the facts, clearly denied him the right to benefits and all seven of the judges of the Supreme Court agreed that for this reason he was not entitled to receive benefits.

The ultimate question in this case was whether, under the circumstances, claimant was entitled to benefits? That question was as much before the Supreme Court as it was

before the Board of Review. That is the ultimate question which was before the Board of Review, the Common Pleas Court, the Court of Appeals and the Supreme Court. The fact that appellant was allowed to have printed a very meagre abstract of the record by the Supreme Court does not eliminate the ultimate question in this case, which is—appellant's right to receive benefits. That is the only question before the court, the other matters which were discussed are only reasons why he should or should not receive benefits.

The record which has been furnished in this appeal by the appellant fails to establish that a jurisdictional question was reserved. However, the record does show that, among other things, the Supreme Court did decide this cause on a non-federal ground, independent of any federal question, based upon the record which was before the Supreme Court, which adequately supports such judgment.

Motion to Dismiss or Affirm

For the foregoing reasons and based upon upon the foregoing authorities these defendants-appellees move that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio, entered on the 1st day of May, 1946.

Respectfully submitted,

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